

8

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

FAO No. 466/2016

%

24th May, 2017

MUKESH

..... Appellant

Through: Mr. Nitin Dayal, Advocate.

versus

STATE & ORS.

..... Respondents

Through: Ms. Jayati Parasher and Mr.
Rajat Gava, Advocates for R-2.
Mr. Ompal Singh, Advocate for
R-3.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 299 of the Indian Succession Act, 1925 is filed by the appellant impugning the judgment of the probate court below dated 6.10.2015; dismissing the probate petition as barred by limitation.

2. The appellant herein filed the subject probate petition seeking letters of administration of the Will dated 7.6.2007 of his late father Sh. Laxman Singh who expired on 22.5.2008. Deceased Sh. Laxman Singh left behind as his legal heirs, besides the appellant/petitioner/son, the respondent no. 2 in the court below who

was late Sh. Laxman Singh's daughter, and respondent no. 3 in the court below who was the adopted daughter of late Sh. Laxman Singh.

3. Appellant/petitioner proved the Will as Ex. PW1/1 as per the evidence led by the attesting witness. The court below has however dismissed the probate petition as time barred by relying upon the judgment of the Supreme Court in the case of ***Kunvarjeet Singh Khandpur vs. Kirandeep Kaur and Others., (2008) 8 SCC 463.*** The relevant paras of the impugned judgment holding that the probate petition is time barred read as under:-

“Respondent no. 3 filed a probate case bearing no. 5/2009 on the basis of Will of Sh. Laxman Singh dated 5-2-2008. In that petition, present petitioner being one of the respondents filed his objections cum written statement in the year 2009. He later on moved an application under Order 6 Rule 17 CPC for amending his objections. Certified copy of the proposed amended objection cum written statement dated 13-10-2009 is on record which reveals that petitioner wanted to include the relief of grant of probate/letter of administration of the Will dated 7-6-2007 through counter claim. However, petitioner later on withdrew his application under Order 6 Rule 17 CPC by taking liberty from the court to file separate independent probate petition on basis of Will in his favour dated 7-6-2007 which is Ex. PW1/1. The certified copy of the order of the court dated 19-2-2011 passed in case no. 5/2009 is also on record. The said petition filed by the respondent no. 3 bearing no. 5/2009 was dismissed on 25-2-2014 because she failed to prove the Will dated 5-2-2008 in her favour.

All these above facts shows that cause of action for filing present petition for probate/letter of administration in favour of the petitioner on the basis of the Will in question Ex. PW1/1 had arisen firstly on the date of death of Sh. Laxman Singh. Even if it is presumed for the sake of arguments that the cause of action had subsequently arisen on 19-2-2011 when petitioner sought liberty from the court to file fresh petition, then also the filing of present petition on 25-4-2014 after expiry of three years period from the date of said order is clearly time barred and cannot be entertained. Petitioner was required to file the petition atleast within 3 years from the date of order of the court dated 19-2-2011 and failure to file the same makes the present petition time barred upon which basis no relief can be granted.

Art. 137 of Limitation Act is applicable to the Probate or Letter of Administration proceedings and limitation of filing such petition is three years. In this regard reliance can be placed upon the decisions of Supreme Court given in case *Kunvarjeet Singh vs. Kirandeep Kaur* 2008 XII AD (SC) 580 and *Krishna Kumar vs. Rajesh Kumar Sharma* AIR 2009 Supreme Court 3247. The present petition was filed after about six years of date of death of deceased testator and even after expiry of three years period from the date of taking liberty from the court. Accordingly, the present petition is barred by limitation. The earlier view of Delhi High Court given in cases *S.S. Lal vs. Vishnu Mitter Govil* 112 (2004) DLT 877 (DB) and *Kanwal Malhotra vs. State* 125 (2005) DLT 281 that the right to apply for probate/letter of administration is recurring one and no limitation is applicable in such cases is not good law in view of the subsequent Supreme Court decisions referred above. Hence, no relief can be granted to the petitioner in such situation and there remains no other option except to dismiss the present petition. There is no need to discuss the other controversies involved relating to legality, validity and genuineness of the Will in question in such situation because relief claimed cannot be granted to the petitioner even if for the sake of arguments is able to establish that Will Ex. PW1/1 is genuine and duly executed. This issue is decided in favour of respondent no. 3 and against the petitioner.”

4.(i) In view of the judgment of the Supreme Court in the case *Kunvarjeet Singh Khandpur (supra)* it is clear that a probate petition or a petition seeking letters of administration has to be filed within three years of arising of the cause of action. Cause of action arises to claim validity of the Will and letters of administration or probate on such basis when the Will is denied. In the present case, the Will dated 7.6.2007 of the deceased Sh. Laxman Singh was relied upon by the appellant/petitioner in a separate probate case filed by the respondent no. 3 and in which probate case the respondent no. 3 relied upon another Will of deceased Sh. Laxman Singh dated 5.2.2008. In these proceedings filed by the respondent no.3, the present appellant/petitioner had filed an application for amending the

objections and since the appellant/petitioner wanted to include in his defence the relying upon of the Will dated 7.6.2007 of the deceased Sh. Laxman Singh.

(ii) I have put it to the counsel for the appellant/petitioner as to whether in this amendment application filed by the present appellant in the probate petition of the respondent no. 3, whether the respondent no. 3 had challenged the Will of late Sh. Laxman Singh dated 7.6.2007 and it is conceded that the respondent no. 3 did in fact challenge the Will dated 7.6.2007 which is relied upon by the present appellant/petitioner. Therefore, in the year 2009 itself the Will dated 7.6.2007 relied upon by the appellant/petitioner in the present letters of administration case was disputed by the respondent no. 3, and therefore, the cause of action for three years for filing of the present letters of administration petition arose in the year 2009. Hence the present case seeking letters of administration had to be filed by the year 2012 but the same was admittedly filed only in the year 2014 i.e on 25.4.2014. Therefore, though the court below has not correctly held that the cause of action arose on the death of the deceased whose Will is in question, however, since the facts are that the Will which is relied upon by the appellant/petitioner dated 7.6.2007 of late Sh. Laxman Singh was disputed by the respondent no. 3 in the year 2009 in the probate

proceedings filed by respondent no. 3, therefore, the present petition filed by the appellant/petitioner in the year 2014 is barred by limitation.

5. Learned counsel for the appellant/petitioner placed reliance upon para 15 of the judgment in the case of ***Kunvarjeet Singh Khandpur (supra)*** to argue that delay is not material once the Will is proved, and which para 15 reads as under:-

“15. Similarly reference was made to a decision of the Bombay High Court in ***Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani***. Para 16 reads as follows:

“16. Rejecting Mr. Dalpatrai’s contention, I summarise my conclusions thus—

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the court’s permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the date of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not be necessarily be within 3 years from the date of deceased’s death;

(e) delay beyond three years after the deceased’s death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained but cannot be equated with the absolute bar of limitation;

(g) once execution and attestation are proved, suspicion of delay no longer operates.”

Conclusion (b) is not correct while Conclusion (c) is the correct position of law.”

6. In my opinion, the ratio of the judgment of the Supreme Court in the case of ***Kunvarjeet Singh Khandpur (supra)*** of right to

apply within three years is not on the basis of sub-paras (e), (f) and (g) of para 16 of the judgment in the case of *Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani*, AIR 1983 Bom 268 which is referred to in para 15 of the judgment in the case of *Kunvarjeet Singh Khandpur (supra)* and that it is sub-para (d) of the said para 16 which is to be taken with reference to the earlier paras of the judgment in *Kunvarjeet Singh Khandpur (supra)* case which refer to Article 137 of the Limitation Act and that a probate petition is to be filed within three years of arising of cause of action (or right to apply) i.e when the Will is disputed by other side.

7. In view of the above, the probate petition for letters of administration has been rightly dismissed by the court below as being barred by limitation. Dismissed.

MAY 24, 2017
godara

VALMIKI J. MEHTA, J